IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.166 of 2006
WITH
CIVIL APPLICATION No.11627 of 2006
In SPECIAL CIVIL APPLICATION No.166 of 2006
WITH
SPECIAL CIVIL APPLICATION No.167 of 2006
TO
SPECIAL CIVIL APPLICATION No.187 of 2006
WITH
SPECIAL CIVIL APPLICATION No.11516 of 2006
WITH
CIVIL APPLICATION No.11831 of 2006
In SPECIAL CIVIL APPLICATION No.11516 of 2006

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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KEYUR H. SHAH & 2 - Petitioner(s)
Versus
DENA BANK, THR' SR. BRANCH MANAGER & 4-Respondent(s)

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Appearance :

IN SCA Nos.166/2006 to 187/2006 & CA No.11627/2006

MR MIHIR H JOSHI, SR. ADVOCATE, with MR VIMAL M PATEL for Petitioner(s) : 1 - 3.
MR AC GANDHI for MR ANIP A GANDHI for Respondent(s):1
MR PAVAN S GODIAWALA for Respondent(s) : 2 - 4.
M/S THAKKAR ASSOC. for Respondent(s) : 5 – **DELETED**

IN SCA No.11516/2006 & CA No.11831/2006

MR VM PANCHOLI for Petitioner(s) : 1 - 2.
MR AC GANDHI for MR ANIP A GANDHI for Respondent(s):1
MR PAVAN S GODIAWALA for Respondent(s) : 2,
M/S THAKKAR ASSOC. for Respondent(s) : 5 – **DELETED**

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 14/03/2007
COMMON ORAL JUDGMENT

(1) Mr.N.K. Pahwa, learned advocate, appears and states that initially he had been instructed to appear on behalf of respondent No.5 (in SCA Nos.166 to 187/2006) and on behalf of respondent No.3 (in SCA No.11516/2006), but subsequently vide communication dated 03.02.2007, which has been served on respondent No.5/respondent No.3 by Regd. Post A.D., he has sought to retire from the matters. He seeks permission to have his appearance deleted accordingly. Permission granted.

(2) This group of petitions has been preferred by the occupants of property described as '*World Business House*' (hereinafter referred to as 'the mortgaged property') challenging action of respondent No.1-Bank (hereinafter referred to as 'the bank') under provisions of the Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002 (*the Act*). Respondent No.2 is the private limited company, who is the original borrower (*the borrower*) while respondent Nos.3, 4 and 5 are respectively the Chairman and the Directors of the borrower company. It is an admitted fact that respondent Nos.3, 4 and 5 are also guarantors having executed deeds of personal guarantee in relation to the financial facility availed of by the borrower.

(3) On 19.04.1995 the bank sanctioned term loan of Rs.250 lacs subject to the terms and conditions annexed to the said letter. It is an admitted fact that the borrower failed to discharge the liability within the stipulated period. It is also an accepted position between the parties that on the day the bank sanctioned the term loan to the borrower, no premises as such existed and the same were under construction. The petitioners have been subsequently inducted and put in possession. In fact this becomes more than abundantly clear when one reads Condition No.7 which was engrafted as one of the conditions while sanctioning the loan.

(4) The bank initiated recovery proceedings by filing appropriate application before the Debts Recovery Tribunal. In the said proceedings the petitioners were not parties and hence the petitioners, by way of a separate application, sought to be impleaded as necessary parties but failed in their attempt. During pendency of the recovery proceedings before the Debts Recovery Tribunal the provisions of the Act have been invoked and resorted to by the bank. Admittedly, the bank has taken constructive possession of the premises. It is at this stage that the petitioners approached this Court by filing these petitions.

(5) On 10.01.2006 the Court issued notice and after the respondents put in appearance the parties were heard at length. On 11.08.2006 while admitting the matter the Court passed the following order:

> "1. Heard learned Sr. Counsel Mr. Joshi appearing with Mr. Vimal M. Patel for the petitioners and learned advocate Mr. Gandhi for the respondent bank.
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> 2. **RULE.** Mr. Gandhi, waives service of Rule on behalf of the respondent bank.

3. Ad-interim relief in terms of para 20(C) on condition that: (i) the petitioners shall deposit the amount on the basis that the amount payable to the bank is 120 lakhs. (ii) The amount shall be deposited with the respondent Bank on or before **31.08.2006**. (iii) It is clarified that, in the event the amount is not deposited, interim relief granted by this Court will stand automatically vacated with reference to this Court. (iv) It is further clarified that this interim relief operates qua the other occupants of the building, provided they deposit the amount with the respondent Bank at par with the petitioners.

4. This order does not preclude the bank from considering the offer of the petitioners, which, initially started with Rs. 85 lakhs, then Rs. 110 lakhs and finally to Rs. 120 lakhs. It is expected that the bank will bear in mind that the petitioners are constrained to pay this amount over and above the amount they have already paid as the purchase price to the builder and that the proceedings before the Debt Recovery Tribunal survives as it is against the builder, its guarantor/s and all their properties.

In the event of petitioners paying this amount, the bank is directed to keep that amount in a separate 'account' earning interest, so that in the event, bank is able to recover its dues in the pending DRT proceedings from the original borrowers or its guarantors, this could be refunded to the petitioners.

5. The grant of this relief and the admission of the petition shall not be treated as bar in any manner in

pursuing the remedy against the original borrower. The bank shall proceed with the proceedings pending before the Debt Recovery Tribunal against the original borrower in accordance with law.

6. In the event, the bank receives the total amount of Rs. 120 lakhs, the bank should consider sympathetically to release the property pursuant to its offer made earlier.

7. The matter be listed on **06.09.2006** to consider the question of issuing further directions with regard to release of the property qua the persons, who have paid the amount pursuant to this order."

(6) Thereafter, the matters have been heard from time to time and the parties have arrived at a broad consensus as expressed by the learned advocates representing the petitioners on the one hand, the bank on the other hand, and the borrower and two of the director-guarantors. In pursuance of the interim directions issued by this Court, the petitioner have deposited a sum of Rs.79,76,720/-. Payment of this amount is made by two groups, one comprised of the petitioners herein and the other comprised of certain persons who have not approached the Court. There is a third group of persons who have neither deposited

any amount nor approached the Court and hence, persons falling within the third group remain outside the purview of this order and it is made clear that it will be open to the bank to take all appropriate actions in accordance with law qua those persons who have not deposited any amount with the respondent-Bank.

(7) Amongst the persons who have deposited the amounts there are two categories : the first category comprised of the petitioners and similarly situated persons who are seeking to be absolved of all the liabilities having proportionately paid qua area of the property occupied by them and seeking release from the mortgage in lieu of the payment made; the second category is of persons who are not seeking the said relief and have paid unequivocally without reserving any rights for them. However, one thing is certain that each of the occupants who have paid the respective amounts have paid according to the formula worked out between the parties as recorded by this Court in order dated 11.08.2006. Therefore, in so far as the persons who have made the payments the

bank does not have any right to claim any further payment respectively from such persons.

(8) In the aforesaid backdrop of facts and circumstances, it was submitted by the parties that in lieu of the amount so deposited the respective portions of the mortgaged property occupied by such persons should be released from the mortgage so as to enable such depositors to deal with the property without any restriction. Though initially there was some hesitation by the depositors to accept the proposal of the bank that the amounts so deposited may be permitted to be appropriated by the bank, subsequently the learned Senior Advocate appearing on behalf of the petitioners has accepted that the bank may be permitted appropriation subject to the Court imposing certain conditions qua recovery of the balance amount of outstanding dues, refund of the amount deposited, and payment of interest on the amount deposited as and when refunded. On behalf of the respondent-Bank it was submitted that upon appropriation of the deposits being permitted the Bank shall release the property

(proportionate area) of respective persons from the mortgage and shall not keep any claim pending whatsoever qua the said proportionate area vis-a-vis the occupant-depositors while reserving the right of the bank to proceed against the borrower, guarantors and other occupiers of the property who have not deposited any amount vis-a-vis the proportionate area of the mortgaged property occupied by such non-depositors. In so far as the claim of refund was concerned, the submission on behalf of the respondent-Bank was that the bank shall refund the amount to the depositors, regardless of appropriation having been made and entries having been effected in the books of accounts of the bank, only after the bank recovers the sum of Rs.139 lacs, (instead of Rs.120 lacs), which is the figure at which the parties have pegged the overdue amount as of today for the purposes of working out the consensus formula. In so far as the payment of interest is concerned, initially the bank was of the view, as expressed by the learned advocate on instructions, that no interest as such is payable, and the Court should not and cannot make

any order for payment of interest on such deposits. This submission was made in the context of the basic stand of the bank that the mortgaged property was being dealt with by the bank and the petitioners and other depositors had merely made the payments to safeguard their occupation of the premises; that as such, the bank was otherwise within its right to take both constructive and physical possession of the mortgaged property, including the area occupied by the persons who have deposited the amounts and dealt with the same in accordance with law without being fettered in any manner whatsoever. However, subsequently reason has prevailed and the bank is willing to ensure that the occupier-depositors are permitted to retain the property in light of the broad consensus worked out between the parties. On behalf of the bank it was also submitted that the issue of interest, both as to the rate and period, as well as point of time, may be decided by the Court.

(9) In light of what is stated hereinbefore, the petitions can be disposed of with the following directions,

which are translated hereunder on the basis of the broad consensus arrived at between the parties as expressed in the course of submissions:

(i) The amount deposited by the occupier-depositors shall be appropriated by the bank;

(ii) Upon such appropriation the bank shall immediately issue a necessary communication/certificate to each of the individual occupier-depositor that the proportionate area of the mortgaged property stands released from the mortgage and thereafter the occupier-depositor shall be free to deal with the said property as an absolute owner, without any right or claim of the bank existing qua that proportionate area;

(iii) As recorded by this Court on 11.08.2006 the amount of Rs.79,76,720/- was to be kept by the bank in a separate account earning interest and, therefore, any amount which has accrued till 31.03.2007 shall go to proportionately increase the total recovery and shall consequently decrease the total outstanding liabilities of Rs.139 lacs.

(iv) The bank shall maintain a separate account showing the proportionate recovery with reducing balance of the outstanding dues and the annual accounts of the bank shall at the foot of accounts record these figures by way of a separate note which shall be certified by the auditors of the bank;

(v) Such accounting and the note as specified hereinbefore shall appear every year till the point of time all the occupier-depositors are refunded the respective amounts, with/without interest;

(vi) The bank shall effect recovery of the entire outstanding dues of Rs.139 lacs from:

(a) the remaining mortgaged property, namely, the property which is not released qua the deposits made;

(b) the other/personal properties of the guarantors which have come on record by way of separate affidavit as well as on record of Debts Recovery Tribunal, and such recovery shall be without taking into consideration the amount deposited and appropriated by the bank;

(vii) The bank shall ensure that regardless of the entries made in the books of accounts, either for the purposes of cleaning up the balance-sheet of the bank, or for any other purpose, the appropriated amount shall not be used or shown as recovery from the borrower and the outstanding liability of the borrower and/or guarantors shall be computed without taking the aforesaid deposited amount into consideration;

(viii) The bank shall endeavour to effect entire recovery and complete the recovery proceedings within a period of 18 (eighteen) months commencing from 01.04.2007;

(ix) In the event of failure of the bank to complete such recovery proceedings latest by 30.09.2008, the bank shall be liable to pay interest at the prevailing rate applicable to savings bank account on the amount deposited by the petitioners and such interest shall be credited at every half yearly rests;

(x) In the event the bank is able to effect recovery of Rs.139 lacs, which shall be the total sum of the amount deposited plus interest earned on the said account till 31.03.2007 plus amount recovered before

the period of 18 (eighteen) months as aforestated, the direction to compute and credit interest as stated hereinbefore shall stand modified so as to ensure that the interest shall start running on a day-to-day basis from the day the total figure of Rs.139 lacs is touched by the bank. In other words, after taking into consideration the amount deposited, namely, Rs.79,76,720/- plus interest earned thereon upto 31.03.2007, plus balance amount recovered so as to make a sum total of Rs.139 lacs shall ensure that the sum of Rs.79,76,720/- shall earn interest at the prevalent rate applicable to savings bank account;

(xi) The bank shall refund the entire amount of Rs.79,76,720/- to the depositors upon the bank having effected recovery in excess of Rs.139 lacs to the aforesaid extent, namely Rs.139 lacs plus Rs.79,76,720/-, and such refund shall be with interest as specified hereinbefore.

(10) The petitioners shall file an undertaking to the effect that appropriation as directed hereinbefore of the deposited amounts shall not be objected to by the petitioners. The bank shall file an undertaking incorporating all the directions issued by this Court and undertaking compliance of the same from time to time. The respective undertakings to be filed within a period of 02 (two) weeks from today.

(11) It is made clear that the orders made by this Court as well as Debts Recovery Tribunal, operating against the borrower and the guarantors vis-a-vis other properties, shall continue to operate and it will be open to the bank to take all actions in accordance with law to effect recovery of the entire decretal amount of Rs.139 lacs with interest from the borrower and/or guarantors, subject to the directions as stated hereinbefore.

(12) Needless to state that this order having been made on the basis of a broad consensus shall not operate as a precedent either in so far as any bank or financial institution is concerned, or any occupier-depositor of any mortgaged property is concerned.

(13) It is necessary to record that though initially on behalf of the respondent-Bank various legal contentions, including maintainability of the petition, were raised the same have not been pressed in light of the broad consensus arrived at between the parties. Hence, it is not necessary to set out and deal with all such contentions.

(14) The petitions are disposed of accordingly. Rule made absolute in aforesaid terms. There shall be no order as to costs.

(15) The learned advocate appearing for the respondent-Bank is directed to serve a simple copy of this order on the responsible officers of the bank, including the recovery officer of the Debts Recovery Tribunal for necessary compliance.

CIVIL APPLICATION Nos.11627/2006 & 11831/2006

These applications had been originally preferred for amending the respective petitions. In light of the order made in the main petitions, the applications have been rendered infructuous and are disposed of accordingly. NOTICE discharged in Civil Application No. 11627 of 2006.

Registry to place a copy of this order in connected matters.

Sd/-
[D.A. MEHTA, J]

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Bhavesh*